2008

Rick Baldassin, Cindy Baldassin v. Jan S. Freeman, Jan S. Freeman, PC : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

RICK BALDASSIN and CINDY BALDASSIN, Plaintiffs and Appellants, vs. JAN S. FREEMAN, M.D. and JAN S. FREEMAN, M.D., P.C., Defendants and Appellees.	APPELLANTS' REPLY BRIEF Appeal No. 20080390 Civil No. 060700579

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Pursuant to Utah Rule of Appellate Procedure 24(c), Appellants submit the following reply brief.

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The Standard of Review is Clear on a Motion for Summary Judgment

Although Appellees attempt to restate the issues on appeal, there is no question in this case regarding the proper standard of review. Whether the district court incorrectly granted summary judgment, and whether the district court erred when it failed to construe the facts in a light most favorable to the non-moving party, present issues of law that are reviewed for correctness. *See Traco Steel Erectors, Inc. v. Comtrol, Inc.*, 2007 UT App 407, 175 P.3d 572; *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1100 (Utah 1995); *Kilpatrick v. Wiley, Rain & Fielding*, 909 P.2d 1283,1292-93 (Utah Ct. App. 1996).

In addition, whether the district court properly applied the law as to estoppel is a question of law reviewed for correctness. *See Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶ 31, 989 P.2d 1077 (reviewing trial court's legal conclusions regarding application of estoppel doctrine for correctness).

Argument

I. The District Court Improperly Ignored Material Facts, Improperly Applied Rule 7, and Improperly Granted Summary Judgment.

Contrary to Appellees' statements, Appellants argued in their opening brief that the district court erred, not by "utilizing Dr. Freeman's statement of facts," Appellees' Brief at 12, but ignoring almost all of the undisputed additional facts Appellants presented. *See* Appellants' Brief at 12-13 ("The district court failed to liberally construe the facts in favor of Appellants. Indeed, the district court largely ignored the facts presented by Appellants altogether.") This is clear from the district court's Ruling, which

makes almost no mention of the additional facts presented by Appellants, and makes no attempts to assess why such facts are insufficient to send this case to a jury. *See* Ruling, R. 351-56.

Appellees do not refute that Appellants' additional facts were ignored by the district court. Instead, Appellees argue that, once they set forth a selection of facts for the district court's review, "it was incumbent upon [Appellants] to determine which, if any, of those facts they desired to and could legitimately controvert." Appellees' Brief at 14. Appellees then assert that, if these particular facts are not controverted, summary judgment is necessarily appropriate. *See id.* at 13-15. This theory is not supported by Rule 7 or 56, interpretative case law, or common sense.

Consider the typical car accident case under Appellees' version of Rules 7 and 56: Car A hits Car B from behind at an intersection. The owner of Car B sues the owner of Car A, and alleges in support of her motion for summary judgment that she was driving Car B, and that Car A hit her from behind. Under Appellees' interpretation of Rules 7 and 56, the owner of Car B is entitled to summary judgment because the owner of Car A cannot dispute these two facts. That the owner of Car A has *additional facts* to add to the story would be irrelevant; for instance, the fact that Car A stopped short at a green traffic light, causing the accident in question, would be immaterial, as would the fact that Car A was hit from behind, forcing it into Car B.

While this result appears absurd, it is precisely what Appellees argue here - that the additional facts set forth by Appellants have no relevance and should not be considered, because they do not dispute the particular facts asserted by Appellees. This argument is without legal basis, and is precisely the reason the district court's ruling should be reversed.

The plain language of Rule 7 is clear:

> A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

Utah R. Civ. P. 7(c)(3)(B) (emphasis added); *see also Bluffdale City v. Smith*, 2007 UT App 25, ¶ 7, 156 P.3d 175. The sole result of not disputing the moving party's statement of fact is, unsurprisingly, that these facts are considered undisputed. *See* Utah R. Civ. P. 7(c)(3)(a) ("Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.").

However, neither Rule 7 nor Rule 56 provides that failure to dispute the particular facts asserted by the moving party renders summary judgment appropriate. To the contrary, Rule 7 allows for consideration of "additional facts in dispute," Utah R. Civ. P.

7(c)(3)(b), while Rule 56 states that "judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). Thus, "[s]ummary judgment is appropriate *only* when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *IHC Health Services, Inc. v. D & K Management, Inc.*, 2008 UT 73, ¶ 15 (emphasis added).

Under these rules, a nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Macris & Associates, Inc. v. Neways, Inc.*, 2006 UT App 33, ¶ 18, 131 P.3d 263 (citation omitted). "[O]nce the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact." *Waddoups v. Amalgamated Sugar Co.*, 2002 UT 69, ¶ 31, 54 P.3d 1054. The nonmoving party must present "evidence that could be interpreted to satisfy the elements of the claim." *Id.* at ¶ 35.

Appellants presented such evidence to the district court in their undisputed statement of additional facts.[1] Therein, Appellants set forth evidence that raised a question as to whether the doctrine of estoppel should apply to prevent Appellees from

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[1] Appellants then argued, in the body of their memorandum, how those additional facts raised genuine issues of material fact; the district judge did not have to compare and contrast the parties' statements of facts. (R. 214 at 17-18).

asserting the statute of limitations, to wit, how Rick Baldassin was led to believe that, because of Dr. Freeman's admitted negligence, Rick's bills and expenses would be taken care of; how Rick relied on these promises, followed Appellees' instructions in this regard, supplying his medical bills, expenses, and lost income, to Dr. Freeman and his insurance agent; and how this promise was broken, to Rick's great detriment, once the statute of limitations expired. *See* Memo. in Opp. to Motion for Summary Judgment at 4-10; R. 217-23.

These facts, when considered in Appellants' favor, raise a material question as to whether there was "(1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; [and] (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or failure to act," rendering summary judgment improper. *Travelers Ins. Co. v. Kearl*, 896 P.2d 644, 648 (Utah Ct. App.1995). *See also Rice v. Granite School Dist.*, 456 P.2d 159, 162-63 (Utah 1969) ("One cannot justly or equitably lull an adversary into a false sense of security thereby subjecting his claim to the bar of limitations, and then be heard to plead that very delay as a defense to the action when brought."); *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880, 892 (Utah 1993) (holding summary judgment improper where facts were in dispute relating to invocation of waiver or estoppel); *Mandola v. Mariotti*, 557 S.W.2d 350 (Tex. Ct App.- Houston 1977) (reversing summary judgment on statute of limitations claim due to existence of material fact); *Sander v.*

Wright, 394 N.W.2d 896 (S.D. 1986) (reversing summary judgment because issue of fact existed as to whether conduct of driver's insurance adjuster estopped driver from asserting statute of limitations); *Gagner v. Strekouras*, 423 A.2d 1168 (R.I. 1980) (summary judgment reversed due to questions of fact as to estoppel); *Zaayer v. Edwards*, 429 N.E.2d 607 (Ill. App. Ct. 1981) (dismissal reversed where plaintiff raised factual issue regarding conduct of defendant's insurance agent).

The district court's approach, like Appellees' argument attempting to justify this approach, was flawed and led to the improper grant of Appellees' motion for summary judgment. By focusing solely on the facts asserted by Appellees, the district court ignored the facts set forth by Appellant. This is particularly prejudicial where the issue is as fact-sensitive as estoppel, *see IHC Health Services, Inc. v. D & K Management, Inc.*, 2008 UT 73, ¶ 15 ("Because waiver is intensely fact-dependent, district courts should exercise care when granting summary judgment on this issue."), and resulted in an improper determination of Appellees' motion:

> [a] district court is precluded from granting summary judgment "if the facts shown by the evidence on a summary judgment motion support more than one plausible but conflicting inference on a pivotal issue in the case ... particularly if the issue turns on credibility or if the inferences depend upon subjective feelings or intent."

Id., ¶ 18 (citation omitted).

For instance, Appellees argue (and the district court held) that two facts they asserted - that Rick Baldassin did not want to sue Dr. Freeman because it could hurt

Rick's piano business, and that Dr. Freeman at some point told Rick to sue him (see Brief of Appellees at 18-19) - preclude as a matter of law a finding of estoppel, without regard to the additional facts asserted by Appellants. This ignores Rick's own testimony, that because of Dr. Freeman's admissions of liability, as well as his promises to pay ("[i]n a period of time, you're going to be getting a lot of bills as a result of these - this extended stay and extra surgeries that we've done, and when you get them, I want you to collect them all up and bring them to my office, and I'll take care of them" (R.218)), he did not sue:

> **Q** I want to turn now to payments that were made by UMIA. We've talked about all the conversations you had with Dr. Freeman; correct?
>
> **A** Yes.
>
> **Q** Okay. When did you first believe that Dr. Freeman had been negligent in his treatment of you?
>
> **A** When he offered to pay.
>
> **Q** And when was that?
>
> **A** While I was in the hospital in May of 2003.
>
> Q And at that point, you were aware that you had a viable lawsuit or that you had a potential claim?
>
> **A** It didn't really cross my mind. I was more interested in staying alive.
>
> Q Okay. At some point after your treatment, you were aware that you would have had an actionable lawsuit at that point. Weren't you aware of that?

A Because of the way it was handled at the time, it didn't cross my mind.

Id., R.219.

Appellee's Motion for Summary Judgment asked for, and received, a dispositive, legal ruling on what is essentially a normative, subjective and fact-laden inquiry: What *should* Rick have done, given the facts as presented? Should he have sued, despite Appellees' promises to pay (and the fact that payments were made, as promised, until the statute of limitations lapsed)? Would Rick have sued Dr. Freeman from the outset had Dr. Freeman not made these promises? Was Rick's reliance on Dr. Freeman's assertions and actions reasonable? This questions should be answered by a jury. *See Travelers Ins. Co.*, 896 P.2d at 648; *Rice*, 456 P.2d at 162-63; *United Park City Mines Co.*, 870 P.2d at 892; *Mandola*, 557 S.W.2d 350; *Sander*, 394 N.W.2d 896; *Gagner*, 423 A.2d 1168. At the very least, Rule 56 requires that a district court consider facts asserted by the non-moving party, and apply such facts to applicable legal principles, before resolving such disputes.

Because the district court improperly gave more weight to some facts than others (while many facts presented received no weight or consideration whatsoever), and because the facts asserted by Appellants create a genuine issue for trial, *see Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1100-01 (Utah 1995); *Pigs Gun Club, Inc. v. Sanpete County*, 2002 UT 17, ¶ 24, 42 P.3d 379, Appellants respectfully request that this

Court reverse the district court's decision granting summary judgment and remand for trial.

II. Dr. Freeman is equitably estopped from raising a statute of limitations defense because he repeatedly directed his malpractice carrier to pay all bills, expenses and lost income Appellants incurred and suffered.

Appellees' arguments in opposition to Appellants' opening Brief suffer the same flaw as the district court's ruling: they ignore the additional undisputed facts Appellants placed before the district court in opposition to Appellees' Motion for Summary Judgment. Between the date of the negligent surgeries by Dr. Freeman, May 16, 2003, and the second payment to the Appellants by Dr. Freeman's malpractice insurer in February, 2005, all of Appellants' medical bills, expenses and lost income were paid by Dr. Freeman's malpractice insurer, at Dr. Freeman's direction.[2] Also during that same time frame, Dr. Freeman on several occasions admitted his medical negligence to the Baldassins. R. 217, 218-19. It is the context of these various facts that raises the genuine issue of material fact as to the first element of equitable estoppel, and which must go before a jury. A district judge cannot weigh the evidence, and make a ruling, in the

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[2] The Appellees repeatedly state in their Brief that Dr. Freeman made "some" payments. The record shows that he directed his insurance carrier to pay all of the Baldassins' bills, expenses and lost income. R. 218. In the hearing before the district court, Appellees' counsel repeatedly characterized the payments made by Dr. Freeman's malpractice carrier to or on behalf of the Appellants as "limited." In fact, the payments made by Dr. Freeman's malpractice carrier, to or on behalf of the Appellants, in August, 2004 and February, 2005, totaled more than $100,000. R. 381 at 17.

context of a motion for summary judgment. *Holbrook Co. v. Adams*, 542 P.2d 191, 193 (Utah 1975).

A jury would hear the evidence and consider the following: Rick Baldassin was fighting for his life after the May 16, 2003 negligent surgeries by his treating surgeon.[3] He had to undergo two ameliorative surgeries in late May and had a very rocky recovery over the course of the next year. During this time, he and his wife were told by Dr. Freeman that he had made certain mistakes that were causing Rick's medical problems. He also told them, on occasion, that they should sue him. He also told them that they would be getting a lot of bills for all of this medical care, and that they should put all of those bills, and evidence of their lost income, together and give them to him, so that he could take care of all of them. Then he directed them to his malpractice insurance adjuster, who took the documentation of the medical bills, expenses and lost income, and on two separate occasions (August 2004 and February 2005) paid to Appellants, or health care providers on Rick's behalf, the total of all of those bills, expenses and lost income.

It is undisputed that Dr. Freeman never told Appellants that there was a statute of limitations deadline by which they had to sue him. R. 119 at 7, ¶18. Rick Baldassin testified that Dr. Freeman's malpractice insurance adjuster, Michael Imbler, never told either of the Baldassins that there was a statute of limitations deadline by which time the

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[3] In their brief, Appellees repeatedly (at 7, 10, 16, 17, 18) state that Dr. Freeman "nicked" Rick's bowel. In fact, he nearly cut all the way through the bowel. R. 214 at 11-12, ¶27 (1); R. 381 at 16.

Baldassins had to file a lawsuit. R. 214 at 9, ¶ 19. The Baldassins had been led to believe by Dr. Freeman that they should continue to put together medical bills, expenses, and lost income documentation, provide them to Mr. Imbler, and those economic losses[4] would be paid. Then, all of the sudden, Dr. Freeman's malpractice insurer stopped living up to that agreement, Dr. Freeman told Appellants there was nothing more he could do, and they should sue him. *Id.* at 7-9 ¶ 12-15. So they did.

These are facts that are all relevant to the first element of equitable estoppel: "a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted . . ." *Traveler's Ins. Co. v. Kearl*, 896 P.2d at 647. These facts reasonably can be interpreted to reflect Dr. Freeman's statement, admission or act that as long as the Appellants provided their medical bills, expenses and lost income documentation to his malpractice insurer, he would see that they were paid. His post-statute of limitations deadline claim, that Appellants should have sued him before the statute of limitations deadline, and since they did not, he would no longer direct his malpractice insurer to pay those medical bills, expenses and lost income, is clearly inconsistent with his initial statement, admission or act. The first element of Appellants' equitable estoppel claim is satisfied; at the very least, it should go to a jury for decision. On that basis, Appellees

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[4] Appellees argue, in passing, that Appellants never sought general damages, only special damages, from Dr. Freeman. This is irrelevant. Under the cases Appellants have cited in their initial Brief and this Brief, most, if not all, of the factual scenarios concerned payment by an insurer of special damages (medical bills), rather than general damages, or special and general damages.

respectfully request that this court reverse the district court's decision granting summary judgment and remand this matter for trial.

III. Because there are disputed facts regarding Appellants' reasonable reliance on Dr. Freeman's admissions of liability and payment of all of their medical bills, expenses, and lost income, the district court erred in rejecting their reasonable reliance argument.

The Appellees claim that the Appellants did not reasonably rely upon Dr. Freeman's admissions of liability, both verbally and through his directing his malpractice insurer to pay all of Appellants' medical bills, expenses and lost income from May, 2003 through February, 2005, because their malpractice insurance adjuster testified that ". . . the Baldassins indicated 'they could not file a lawsuit against a physician because . . . that would not be good for business.' " Appellees' Brief at 21. Interestingly, when each of the Appellants were deposed, neither were asked if they had made this statement to Mr. Imbler. Furthermore, the context of Mr. Imbler's testimony was that that comment was made to him in the same conversation during which he allegedly told the Appellants that "the statute of limitations is two years where they would have to either perfect their claim or file a lawsuit against Dr. Freeman if the claim was not settled by then." (R. 119 at 8, citing Exhibit 5). The Appellants specifically disputed that such conversation ever took place. R. 214 at 9, ¶19; see also R. 293 at ¶ 3-5.[5]

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[5] Not only did the district court ignore almost all of the facts presented by the Appellants, but in its ruling, when it held that all of Appellees' facts were uncontroverted, it contradicted its own statement at the hearing regarding whether Appellees' malpractice insurance adjuster on one occasion told the Appellants about the requisite statute of limitations. At the hearing, the district court noted that was a disputed fact. R. 381 at 27; compare to R. 351 at 2

The conversation that Dr. Freeman's malpractice insurance adjuster, Michael Imbler, testified that he had with the Appellants (on which testimony Appellees completely rely for this portion of their argument), in which the Appellants indicated that they could not bring an action against a doctor, took place in September of 2003, no more than four months after Dr. Freeman's initial negligent surgeries and while Rick Baldassin was still trying to recover from all of the complications caused by Dr. Freeman's negligent surgeries, including subsequent ameliorative surgeries. A jury would hear that more than two years then went by, with Dr. Freeman directing his malpractice insurance carrier to pay all of Appellants' medical bills, expenses and lost income; the statute of limitations ran on Appellants' claims; and once that deadline passed, Dr. Freeman and his malpractice insurance carrier then refused to pay any of Appellants' further medical bills, expenses and lost income. After hearing all of that evidence, a jury would be asked, did the Appellants reasonably rely on Appellees' acts and statements in not earlier filing suit against Appellees? It is not for the district court to weigh the competing facts, determine which it believes are more or less credible, and then make a ruling in the context of a pending motion for summary judgment.

The district court erred, and Appellees respectfully request this court to reverse the district court's award of summary judgment and remand this matter for trial.

(referencing Appellees' statement of undisputed facts, ¶22).

IV. Public policy concerns are not at issue in this appeal.

In the "Statement of the Case" section of their brief at 4, Appellees argue that there is an implicit public policy issue in this appeal, that is, that this court's consideration of the equitable estoppel doctrine, under the facts of this appeal, should include

> . . . whether public policy should encourage a physician to address complications of treatment with prompt, appropriate and non-judgmental contributions to the welfare of his/her patient, or whether the physician should refrain from interacting with and supporting the patient out of concern that the physician's actions and statements might be misconstrued and used as the basis for precluding the physician's use of the statute of limitations defense.

This issue was never briefed before the district court. R. 119, 214, 297. The district court mentioned it in passing during oral argument, and Appellants' counsel responded. R. 381 at 23-25. More importantly, the way Appellees have articulated this non-issue is exactly why this matter should be heard by a jury. Given the significant amount of dollars that Dr. Freeman directed his malpractice insurance company to pay the Appellants, and given the admissions of liability by Dr. Freeman to the Appellants, as well as the context of Rick Baldassin's ongoing health issues after Dr. Freeman's initial negligent surgeries, were Dr. Freeman's actions in that regard, as compared and contrasted to his subsequent refusal to continue to pay medical bills, expenses and lost income to the Appellants after the requisite statute of limitations had run, support for Appellants' equitable estoppel argument?

It is just as arguable a public policy to support potential medical malpractice claimants who do not rush to sue their treating doctors; rather, they continue to trust him, reasonably relying upon his word that he will pay for all medical bills, expenses, and lost income they incurred as a result of his negligence, and allow him to continue to provide medical care that (hopefully) will rectify the medical results of his negligent acts. Reasonable minds can differ as to whether Dr. Freeman's actions were either admissions of liability or were actions of a good Samaritan. That is for a jury to sort out, not the district court in a summary judgment context.

CONCLUSION

The district court erred when it granted Appellees' Motion for Summary Judgment. The district court failed to liberally construe the facts in favor of Appellants. In addition, material issues of fact exist precluding summary judgment exist at to whether Appellees should be estopped from asserting the statute of limitations. Accordingly, Appellants request that this Court reverse the order granting summary judgment and allow Appellants to present its case to a jury.

DATED this 9th day of December, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9 day of December, 2008, I caused two true and correct copies of the foregoing **APPELLANTS' REPLY BRIEF,** to be mailed first class, postage fully pre-paid, to the following:

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